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HAROLD B. WILLEY, CL

# In the Supreme Court of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

*Petitioner,*

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, The Martin Brothers Box Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the cause in said Court entitled Interstate Commerce Commission, et al., Appellants, vs. The Martin Brothers Box Company, a corporation, Appellee, on January 10, 1955, Petition for Rehearing, applied for within the time provided by the rules of said Court, denied March 1, 1955.

## OPINIONS BELOW

The opinion, concurring opinion and dissenting opinion of the Court of Appeals (Appendix 1-31; Record 846-868) are reported in 219 F. 2d 811.

The opinion of the District Court of the United States for the District of Oregon (App. 33-59; R. 42-75) is reported in 128 F. Supp. 919).

The report of the Interstate Commerce Commission (R. 108-126) is reported in 280 I.C.C. 395. The proposed report of the Examiner is in the Record pages 84-106.

## STATEMENT OF JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered January 10, 1955 (R. 869). Petition for Rehearing filed within the time allowed by its rules was denied March 1, 1955 (R. 870). Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), 28 U.S.C.A. § 1254 (1).

## QUESTION PRESENTED

Is it within the exclusive province of the Interstate Commerce Commission to interpret the provisions of the Interstate Commerce Act prohibiting undue preferences among interstate shippers of freight by railroad and prohibiting undue discrimination against a particular shipper to the substantial damage of the shipper discriminated against? When the Commission found on substantial evidence and with no evidence to the contrary that shippers generally were supplied with 80 per-

cent or more of the cars required, while the shipper discriminated against was furnished only about 30 percent of the cars required and was substantially damaged, but did not show that it was in a competing business with the favored shippers, is the Commission conclusion that the discrimination was not undue or unreasonable under the Act binding upon and conclusive against the Courts? Or does such a conclusion present an issue of law which it is the duty of the courts to examine and decide?

## STATUTES INVOLVED

The statutory provisions involved are the Interstate Commerce Act, 49 U.S.C.A. §§ 1(4), 1(11), 3(1), 9, and 17(9); and the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1009 (e). These are printed in Appendix B. District Court jurisdiction rested upon 28 U.S.C. § 41 and §§ 43-48 (28 U.S.C.A. §§ 1336, 1398, 2321, 2322, 2323, 2324 and 2325).

## STATEMENT OF THE CASE

The facts found by the Commission, based upon substantial evidence in the record (as to which neither any member of the Commission, nor the District Judge, nor any of the three Court of Appeals Judges had any difference of opinion) are:

During the period from January 1 to September 30, 1947, or portions of this time, there existed a general shortage of railroad freight cars on the lines of the defendant railroad, which was operating as a common carrier of freight in interstate commerce.

The petitioner was operating at Oakland, Oregon, a small town on the Siskiyou line of the carrier, which was not served by any other railroad, a wirebound box manufacturing plant, and required for transportation of petitioner's products by railroad in interstate commerce from 8 to 13 railroad cars per working day. During this peiod of 191 working days the carrier supplied for transportation of petitioner's products in interstate commerce a total of 593 cars, or an average of 3.1 cars per working day, or about 30 percent of its car requirements.

During this same time the railroad furnished to other shippers along its lines, for transportation of their products, an average of 80 percent of all the freight cars required by them, and at points on its lines where competition with other railroads existed gave shippers better service.

The Interstate Commerce Commission, having considered the evidence establishing these facts and having determined these to be the facts then made certain conclusions:

1. The shipper discriminated against, a wirebound box manufacturer, had not established that any of its competitors was unduly preferred by the practices of the railroad (R. 121).

2. The proof of the damages resulting from this discrimination was not sufficient to support an award of reparations in a court (R. 126).*

3. The petitioner's complaint demanding adequate car service and reparations should be dismissed (R. 126).

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*The District Court and also the Court of Appeals (except for Judge Healy) found the shipper's proof sufficient to support an award of reparations.

Upon a petition to the District Court of the United States for the District of Oregon to review this decision of the Commision, the trial court reviewed the record before the Commission and determined and adjudged that the facts found as facts by the Commission were based upon substantial evidence in the record, but that the conclusions of the Commission had no rational basis in law in view of the facts so found. The District Court set aside the Commission's order and remanded the matter to the Commission for further proceedings.

On appeal by the Commission and by the carrier to the Court of Appeals for the Ninth Circuit the case was reversed by a divided court. The several opinions are discussed below.

Authority of the Interstate Commerce Commission to hear the complaint of petitioner in the first instance is found in section 9 of the Interstate Commerce Act (49 U.S.C.A. § 9).

The jurisdiction of the District Court rested upon the Urgent Deficiencies Act of 1913, 28 U.S.C. §§ 41, 43-48, 28 U.S.C.A. §§ 1336, 1398, 2321, 2322, 2323, 2324, 2325 and section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17, 49 U.S.C.A. § 17.

Judicial review of arbitrary and capricious administrative action is afforded also by the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1009(e).

For a one judge determination rather than a three judge District Court, and appeal to the Court of Appeals rather than this Court, see U. S. vs. I.C.C., 337 U.S. 426, 441.

## REASONS FOR GRANTING THE WRIT

Since railroad freight car service and the free and unhindered movement of goods in interstate commerce are of vital importance to the nation and all its citizens, the general importance of the questions presented by this case seems clear.

As illustrative of the importance of the questions presented, Judge Pope in his dissenting opinion in the court below stated:

> "If this decision stands the railroads can proceed, wholly without hindrance from the Commission, so to pick and choose among shippers that they will, in many instances, be exercising the power to say which industries shall live and which shall die. What has happened here appears to me to be an unthinkable abnegation of its duties by the Commission." (R. 855; App. 13)

The decision of the court below is in conflict with the applicable decisions of this Court, as well as the applicable decisions of other courts of appeal. Also, the decision raises an important question of federal law which has not been, but should be, settled by this Court.

The Commission determined as a fact that during the time the petitioner was being supplied with about 30 percent of the cars required to transport petitioner's products in interstate commerce favored shippers were being supplied an average of 80 percent of their requirements. The Commission further found as a fact that at locations on the railroad's lines where shippers had access to other competing lines for movement of their

products these shippers experienced no difficulty in obtaining cars (R. 116). Having made these findings, the Commission then concluded that it had not been shown that the railroad engaged in any unreasonable or otherwise unlawful practice or subjected petitioner to any undue prejudice.

All of the evidence and the findings of the Commission and the opinions of all the reviewing judges confirm the supplying of petitioner with about 30 percent of the car service needed by it and the supplying of favored shippers not in competition with petitioner with an average of 80 percent of the car service required by them.

Based on these facts the Commission's conclusion was that the discrimination was not undue or unlawful. The District Court found this discrimination undue and unlawful as a matter of law. In the Court of Appeals Judge Pope found this discrimination undue and unlawful as a matter of law. Judge Chambers said the Examiner found an unfair discrimination by Southern Pacific Company and that he would uphold the Examiner if he had "latitude" so to do (R. 854; App. 11). Judge Healy, without expressing any opinion as to whether the discrimination was undue or unlawful, was of opinion that:

> "Whether given rates or practices are 'reasonable' or 'unduly prejudicial' are factual determinations confided by Congress to the judgment and discretion of the Commission." (R. 849; App. 5)

The decision of Judge Healy, apparently concurred in by Judge Chambers, is in direct conflict with the decision of this Court in the case of Florida East Coast

Line vs. U. S., 234 U.S. 167, 185. This Court held in this case where, as in the present case, the order of the Commission was rendered without any evidence whatever to support it, "The consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide."

This Court has uniformly condemned discriminatory practices by carriers subject to the Interstate Commerce Act, and as stated in B. & O. R. Co. vs. U. S., 333 U.S. 169, the Act and all amendments to it have aimed at wiping out discriminations of all types.

The decision of the majority in this case is also in conflict with the decision of the Court of Appeals for the District of Columbia in the case of U. S. vs. I.C.C., 198 F. 2d 958, certiorari denied 344 U.S. 893, which case determines that upon a review of a final order of the Interstate Commerce Commission the provisions of the Administrative Procedure Act, affording full latitude to the courts, are to be used. This case was decided on its merits with the entire record considered and weighed. The Court proceeded to "examine the legal and factual basis for each of these conclusions" of the Commission (198 F. 2d at 965). The Court said that while the Commission's views as to questions of law arising in the course of its duties are entitled to weight, nevertheless, "there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact' " (198 F. 2d at 968).

It is thus clear that the decision of the court below is in conflict with the decisions of this Court and the decisions of other courts of appeal in holding that it is beyond the province of the courts to review erroneous

legal conclusions of the Interstate Commerce Commission or the "soundness of the reasoning by which its conclusions were reached."

The majority opinion also raises an important question of federal law which has not been, but should be, settled by this Court. The Commission denied relief to a shipper discriminated against by an interstate rail carrier with the statement that the injured shipper had not established that it was in competition with shippers favored by the carrier. Until or unless the majority opinion of the Court of Appeals is rejected this decision of the Commission will stand as law and will require every claimant before the Commission who has been discriminated against to show a competitive situation before obtaining relief.

Nowhere have we been able to find authority to support this proposition, and neither could Judge Solomon of the District Court, who stated:

> "Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other." (R. 68; App. 55)

nor could Judge Pope, who stated:

> "The reason the trial court was unable to find a decision that permits discrimination as between shippers merely because they are not in the same type of business and do not compete against each other, is in my opinion due primarily to the fact that such a rule as here urged by the Commission has never occurred to any court." (R. 865; App. 26)

The decision which affirms a finding and conclusion of the Commission, to the effect that a shipper, who

has been refused cars or has been discriminated against in car service by a common carrier, must establish, in order to obtain redress, that he is in competition with the favored shippers and that it was his competitors who were unduly preferred, also raises an important question of federal law which has not been, but should be, settled by this Court.

## CONCLUSION

This case presents questions of federal law of general importance. The decision below effects a drastic departure from principles declared by this Court in the Florida East Coast Line case and the B. & O. R. Co. case, supra. It has created a direct conflict with decisions of another circuit which should be resolved by this Court. It has substantially limited the provisions of the Interstate Commerce Act prohibiting undue and unlawful discriminations among shippers. It vitally affects every shipper of goods in interstate commerce by railroad, unless perchance such shipper is engaged in a competing business with another shipper on the lines of the railroad. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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## APPENDIX

### OPINIONS OF THE COURT OF APPEALS

BEFORE: HEALY, POPE, and CHAMBERS, Circuit Judges

HEALY, Circuit Judge

In October of 1947 appellee, hereafter generally called Martin, filed a complaint with the Interstate Commerce Commission alleging that during the period January 1 to September 30, 1947, the Southern Pacific Company failed in its duty to provide and furnish complainant with an adequate supply of box cars for the transportation of its manufactured products from its Oakland, Oregon plant to interstate destinations, in violation of §1(4) and (11) and §3(1) of the Interstate Commerce Act, 49 USCA §1(4) and (11) and §3(1).[1] The relief asked was that the Commission enter an order commanding Southern Pacific to provide Martin with adequate and equal car service from Oakland, Oregon, to various destinations, and to

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[1]Section 1(4) in material part provides: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, . . ."

Section 1(11) provides: "It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3(1) makes it unlawful for any carrier to make or give any undue or unreasonable preference or advantage to any particular person, firm, locality, region, district, or territory; or to subject any of such concerns or territories, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

pay Martin a sum in excess of two million dollars by way of damages. Southern Pacific intervened and in its answer denied the material allegations of the complaint.

The matter was assigned for formal hearings before an examiner for the Commission. Following such hearings the examiner made a proposed report recommending that the Commission find that Southern Pacific failed in its duty to furnish adequate car service to Martin and that damages be awarded the latter in the amount of approximately $135,000 for such failure.[2] Exceptions to the examiner's report were taken by Martin and Southern Pacific, and after argument Division 3 of the Commission made the report and order here under attack. In its report the Commission, under the heading "Conclusions," made, among others, the following ultimate finding: "We find that complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful prac-

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[2]The finding proposed by the examiner was in response to the claim of violation of the statute requiring rail carriers to furnish cars "on reasonable request." No finding was recommended that the railroad had subjected the complainant to undue prejudice in contravention of Section 3 of the Act.

We may note here that the examiner's recommendations were not binding on the Commission. See Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 285-286, where the Court said: "Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence." While this nolding had to do with action of the Radio Commission, we have found in the authorities no indication that the same principle is not applicable to holdings of the Interstate Commerce Commission. See Inter-City Transp. Co. v. United States, 89 F. Supp. 441, 445, where the same principle was applied to a decision of the Interstate Commerce Commission, the court citing *Nelson Bros. Co.*, supra.

tice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant, . . . or that [Southern Pacific] subjected complainant to any undue prejudice in violation of section 3." The complaint was ordered dismissed.[3] Martin petitioned for reconsideration and its petition was denied by the entire Commission by unanimous vote of its membership.

Martin then filed a complaint in the court below naming the Commission and the United States as defendants. The complaint asked that the Commission's order be set aside as invalid for a variety of reasons. One of these was that the order lacks a rational basis because the findings do not support the Commission's conclusions. Another was that the Commission's findings of fact show that Martin was damaged and is entitled to reparation, and that such findings support no other conclusion. Other reasons assigned were that the Commission misapplied the law and that its action was arbitrary and capricious. The court was asked to enjoin and set aside the order and to remand the case to the Commission with directions to award such damages as the court shall find Martin to be entitled to. Southern Pacific again intervened. On the basis of the record before the Commission the court made findings of fact and conclusions of law to the effect that the Commission's report and order are not supported by substantial evidence. Judgment was entered vacating the order and remanding the cause to the Commission with directions to take further action not inconsistent with the court's decision. The matter is before us on appeal from the judgment.

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[3]Martin Bros. Box Co. v. Southern Pacific, 280 I.C.C. 395.

Preliminary to discussion of the case it is well to notice the narrow scope of judicial review of the Commission's orders. It is a long-established principle that such orders are not to be set aside by a court if they are within the Commission's statutory power and are supported by substantial evidence. Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547. To consider the weight of the evidence before the Commission, or the soundness of the reasoning by which its conclusions were reached, is beyond the province of the courts. Virginian Ry. Co. v. United States, 272 U. S. 658, 663. The courts have historically ascribed to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." Ill. Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454. It must not be forgotten that the reviewing court was here confronted with transportation problems involving many factors and calling for the exercise of informed administrative judgment. As was observed by the Supreme Court in a case involving rates, "The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." Board of Trade v. United States, 314 U. S. 534, 546.

It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate

fact.[4] Such approach is erroneous. The courts have repeatedly pointed out that whether given rates or practices are "reasonable" or "unduly prejudicial" are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, p. 665, it was held: "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.'" In Nashville Ry. v. Tennessee, 262 U. S. 318, 322, it was said: "Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case." And in Swayne & Hoyt v. United States, 300 U. S. 297, 304, the Court said that whether a discrimination in rates or services is undue or unreasonable has always been regarded as peculiarly a question committed to the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. Cf. also Johnston Seed Co. v. United States, CA 10, 191 F. 2d 228.

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[4]In its opinion the court said: "I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions. Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record. . . ."

While it is true that under the heading denominated "Conclusions" in its report the Commission stated conclusions of law, it also made factual conclusions and ultimate findings under the same heading.

In its report the Commission took notice of background conditions prevailing during the complaint period, saying:

> "After the close of World War II, the Nation as a whole experienced a great industrial development, and during 1947 the Nation's railroads experienced for the first time since 1920, except in the war period, an average daily shortage of cars. . . . During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the Nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.
>
> "In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest products traffic. . . . The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.
>
> "Another factor affecting the defendant's car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and postwar periods it exerted extensive efforts to conserve and increase its facilities. On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

This resume of conditions has support in the record, and indeed, in many of its aspects, in common knowledge. In

such circumstances it was inevitable that carriers would be faced with complaints by shippers, and the record shows that during the period in question Southern Pacific received thousands of such complaints.

The Commission impartially and at great length summarized the evidence adduced both by the complaining party and by the carrier. In no particular do we discover in the summary a distortion of the record made before the examiner.[5] While much of the summary recites evidence on Martin's part which would support a ruling in its favor, the resume of the carrier's showing points substantially in the opposite direction. For example, we quote a portion of the report:

"In support of its contention that cars were distributed to the complainant on a reasonable basis, the defendant showed that during the period concerned the complainant received more cars than it requested by written car orders,[6] whereas other shippers on its lines,

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[5]There is substantial testimony in the record to the effect that during the complaint period information given to Southern Pacific by Martin's employees as to the need for cars was conflicting, and that the road's representative told Martin's sales representative that it was essential for the shipper to place definite car orders so as to remove the confusion as to its needs. The testimony is in conflict as to the number of cars required by Martin from day to day. It was shown to be the practice of Southern Pacific to furnish cars to the shippers of lumber in Oregon, including Martin, when clear and definite orders for placing were received. It appears from the testimony of the carrier's witnesses that the road did not require that written orders for cars be placed, and that oral orders were honored when clear and definite as to Martin's daily need. Evidence for the carrier discloses that when shippers submitted oral orders, by telephone or otherwise, it was the practice of the carrier's agents to reduce them to writing on printed order forms. Pads of these forms were supplied all shippers. Also, there was a substantial showing that during the emergency the carrier endeavored to pro rate cars between shippers of lumber so that there might be an equitable distribution of the available supply.

[6]See footnote 5.

including the Portland division, were furnished on the average only 80 per cent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 per cent of the aggregate capacity of the district, each shipper was assigned only 50 per cent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first 6 months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available."

Later in the summary attention was called to evidence in the record that a number of cars were kept on hand upon the complainant's siding for several days during much of the complaint period. One car was on hand 7 days, two were on hand 6 days, eleven were on hand on 5 days, twenty-two on hand on 4 days, and fifty-six on hand on 3 days. The Commission thought that these facts were relevant in consideration of the complainant's ability to load cars in addition to those which were furnished.

In its conclusions the Commission stated: "The evidence establishes that from January 1 to June 30, 1947,

complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; *and that it is not shown that defendant unduly favored shippers other than complainant.*" [Emphasis ours.]

In disposing of the shipper's complaint the Commission said: "Complainant alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could